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SIPDIS

DEPT FOR EB/IPC WILSON, DEPT PLS PASS TO USTR BPECK, DOC
KSCHLEGELMILCH, USPTO JURBAN/DLASHLEY-JOHNSON

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TAGS: [KIPR](#) [ETRD](#) [SP](#)

SUBJECT: SPECIAL 301: PROGRESS NOT PERFECTION

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- [B](#). STATE 29549
- [C](#). MADRID 639
- [D](#). MADRID 606
- [E](#). MADRID 386
- [F](#). 03 MADRID 04259
- [G](#). 03 MADRID 04164
- [H](#). 03 MADRID 02481

[1](#)1. SUMMARY: Despite the strong political will of government officials and the stepped up enforcement efforts of police, piracy continues to be a significant problem in Spain as pirates adapt their way of doing business to avoid police, to take advantage of legislative loopholes, and to better use the internet. While illegal software sales have hit a plateau and there has been minimal positive movement in the percentage of illegal CD sales, pirate DVD sales increased slightly. Enforcement efforts are impressive, with over 5 million music and sound recordings seized during raids. Police were successful in thwarting pirates during the prime holiday shopping season. There was also progress in the courts: Nike gained control of its trademark after a 14-year legal battle. The GOS revised its Penal Code to increase punishments for IP offenders, and has continued its efforts to train judges and provide consumer education on IP issues. Spain seems to have faced up to its piracy problem and is committed to apply the training and enforcement resources to stem the tide. In light of these efforts and our sense of GOS commitment to continue the fight, we recommend keeping Spain off the 301 watchlist this year. END SUMMARY

Overall IP Climate

[2](#)2. MUSIC, VIDEOGAMES AND MOVIES: Industry and police contacts in Spain have told us that over the past year, their enforcement actions have yielded some success in deterring pirates and reducing street sales of CDs and DVDs. Nonetheless, the problem continues to be significant --- estimates for CD piracy range between 20% and 30%. DVD piracy is estimated to be much lower. Moreover, pirates are adapting their methods and sales to thwart government and industry enforcement efforts. Sales of pirated CDs continue to be handled mostly by illegal immigrants who display their pirate CD wares on blankets ("mantas," the sellers are therefore called "manteros" in Spanish) on city sidewalks in shopping districts and in subway stations. Because police have cracked down on manteros, a few would-be manteros are now trading in blankets for backpacks to peddle pirate CDs. Some manteros and backpack sellers also carry DVDs. Fewer still sell videogames. More sophisticated pirates have moved on-line. Internet peer-to-peer networks are also on the rise. Industry representatives in Madrid have told us that street sales now concern them much less than the rise of internet piracy sales and illegal downloads.

[3](#)3. SOFTWARE: Illegal software sales in Spain seem to have leveled off at about 49%. While this is a definite improvement over the 74% figure of 1995, there is still much work to be done. The Business Software Alliance (BSA) works with the GOS to increase awareness in small businesses (the main users of illegal software). In addition, police have been active in trying to combat retail sales of illegal software.

[4](#)4. TRADEMARK ISSUES: In February 2004, after more than 14 years of court battles, Nike won a major victory in the Spanish Constitutional Court that once again allows the company to use its trademark (both the name and the swoosh) on apparel sold in Spain. In response to Nike's appeal of a negative 1999 Supreme Court ruling, the Spanish Constitutional Court sided with Nike, annulling the other court's decision. It returned the decision to the Supreme Court asking that it revise its decision based on the findings of Constitutional Court justices. Nike is hoping that the new Supreme Court ruling, expected to be issued within the next 12 months, will be fair and objective.

[5](#)5. PHARMACEUTICAL PATENTS: Spain's pharmaceutical patent problem is a legacy of its old process patent law which was in effect until October 1992. From that point on, all pharmaceutical patents granted have been product patents.

Pharmaceutical companies complain that non-innovative producers are able to easily obtain permission to produce "legal copies" of their process patented drugs if they make minor changes in the production process. Like other countries that have a recent history of process patents, this is a problem that only time will solve. For the next eight years the legacy of the old patent system will continue to irk pharmaceutical companies, but until all process patents are expired, we do not anticipate a significant change in the situation.

¶6. POLICE ENFORCEMENT EFFORTS: Police focus on and action against IP offenses, most notably pirated CDs, have increased over the past year. Combined total raids for national police, Guardia Civil and municipal police against music, videogame, and movie pirates and sellers exceed 10,000 in 2003. Over 5 million movie and sound recordings were seized. Police are frustrated that legislative loopholes, illegal immigrant status of some of those apprehended, and uneven and slow judicial decisions undermine some of their efforts. Our police contacts believe their effectiveness will be enhanced when the revised Penal Code goes into effect later this year (see para 8). In addition to raiding production facilities, police are also making headway in getting "manteros" off the street. Year 2003 police interventions in Spain's piracy focal point, Madrid, surpassed double the number witnessed in 2002. The Madrid municipal police force added extra officers at the end of the year specifically to deter manteros during the peak holiday and New Year shopping season. In Barcelona, frequent raids on a market renowned as a center for pirated software has reduced by half the sales of pirated programs. National police and Guardia Civil are especially equipped and increasing their work to combat on-line piracy.

¶7. EDUCATION EFFORTS: Last year Spain's Interministerial Anti-Piracy Commission and the Consejo Superior Judicial (Spanish administrative body which oversees the courts) signed an agreement to train judges on IP issues. The two bodies will collaborate on two training courses, in April and October, to train 40 to 45 judges each time. More importantly, the contents of each course will be published and distributed to Spanish judges throughout Spain. The Copyright Office at the Ministry of Culture is also working on an education campaign targeting children between 12 and 18 to explain the production process and manpower that goes into making copyright products. The Congreso de los Diputados (the lower house of Spanish Parliament) established a parliamentary sub-committee to propose actions that should be taken to protect IP. At year-end 2003, the sub-committee published a set of recommendations directed at the Spanish government bureaucracy, law enforcement agencies, and Spanish society as a whole, to send a clear signal of the importance of IP protection.

¶8. PENAL CODE REFORM: On November 25, 2003, the GOS modified its Penal Code to reinforce intellectual and industrial property protection. The revised Spanish Penal Code increases the punishments for crimes against IP infringements, especially for repeat offenders. It will enter into force on October 1, 2004.

Ongoing Areas of Review

¶9. OPTICAL MEDIA PIRACY REGULATIONS: Article 25 of Spain's IP legislation establishes a tax on optical manufacturing equipment; operators are required to apply for licenses. There is no legislation requiring that SID (source identification) codes be used on locally manufactured CDs. Despite this however, 12 out of 13 Spanish compact disc manufacturers have signed SID accords with Phillips and IFPI.

¶10. USE/PROCUREMENT OF GOVERNMENT SOFTWARE: As previously reported, in 2000 the GOS published guidelines entitled "The Intellectual Property of Software Programs." These guidelines are for government ministries and outline measures, recommendations and good practices for acquiring and using software. The guidelines have been explained in workshops and are widely available to Spanish government officials, including on the internet.

¶11. TRIPS COMPLIANCE: The GOS counts itself in complete compliance with TRIPS since 1997.

¶12. ENFORCEMENT: See para 6 above.

¶13. COMMENT: In our 301 cable last year we reported that the Spanish government had finally faced up to the magnitude of its piracy problem and was making good faith efforts to combat it. Since then, GOS officials in various ministries have continued their work on the issue and the various domestic police forces have been exceptional in the quantity and scope of their efforts to roll back IP piracy in Spain. The passage of the revised Penal Code also bodes well for continued progress in the fight against pirates. Despite all of these and other abovementioned efforts, the piracy problem

in Spain continues to be significant. It is our judgment that Spanish authorities are aware of the problem and have the political will to fight it. But it will take time. We believe Spain should remain off the Special 301 list. Spain's inclusion on the list will not hasten its progress and may only serve to dampen rather than encourage enthusiasm to take action as a new government takes the reins in a few months. At present our GOS IP contacts are receptive and willing to take our suggestions and listen to our concerns. We will continue to work with them and to monitor Spain's progress and provide assistance and information whenever possible -- and place the fight against IP pirates at the top of our agenda with the responsible officials in the next Spanish government.

ARGYROS